

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN A. SMITH,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

NO. C13-476-JCC-JPD

REPORT AND
RECOMMENDATION

Plaintiff Susan A. Smith appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) that denied her application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be reversed and remanded for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, Plaintiff was a 45-year-old woman with a 10th grade education. Administrative Record (“AR”) at 34. Her past work experience includes employment as a kitchen helper, teacher aide, and babysitter, but the ALJ indicated that this work was not performed at “substantial gainful activity” levels. AR at 19, 58.

1 On June 26, 2009, Plaintiff filed a claim for SSI payments, asserting that she is disabled
2 due to depression, posttraumatic stress disorder (“PTSD”), a spinal disorder, and anxiety. AR
3 at 149-52, 163, 191. The Commissioner denied Plaintiff’s claim initially and on
4 reconsideration. AR at 76-79, 86-91. Plaintiff requested a hearing, which took place on
5 December 7, 2011. AR at 27-65. On December 16, 2011, the ALJ issued a decision finding
6 Plaintiff not disabled and denied benefits based on his finding that Plaintiff could perform a
7 specific job existing in significant numbers in the national economy. AR at 11-20. Plaintiff’s
8 administrative appeal of the ALJ’s decision was denied by the Appeals Council, AR at 1-5,
9 making the ALJ’s ruling the “final decision” of the Commissioner as that term is defined by 42
10 U.S.C. § 405(g). On March 15, 2013, Plaintiff timely filed the present action challenging the
11 Commissioner’s decision. Dkt. 1, 3.

12 II. JURISDICTION

13 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
14 405(g) and 1383(c)(3).

15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of
17 social security benefits when the ALJ’s findings are based on legal error or not supported by
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
19 Cir. 2005). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Smith bears the burden of proving that she is disabled within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 The Commissioner has established a five-step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
9 or more medically severe impairments, or combination of impairments, that limit her physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment meets
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is

22
23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can
 2 perform other work that exists in significant numbers in the national economy, taking into
 3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
 4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
 5 claimant is unable to perform other work, then the claimant is found disabled and benefits may
 6 be awarded.

7 V. DECISION BELOW

8 On December 16, 2011, the ALJ found:

- 9 1. The claimant has not engaged in substantial gainful activity since June
 10 4, 2009, the application date.
- 11 2. The claimant's major depression, diabetes mellitus, PTSD, and obesity
 12 are severe impairments.
- 13 3. The claimant does not have an impairment or combination of
 14 impairments that meets or medically equals the severity of one of the
 15 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.
- 16 4. The claimant has the RFC to perform light work as defined in 20
 17 C.F.R. § 416.967(b) except that the claimant can stand only 4 hours in
 18 an 8 hour workday, can perform only simple, routine and repetitive
 19 tasks, is limited to only occasional interaction with the public and
 20 occasional interaction with co-workers, and is limited to only frequent
 21 feeling.
- 22 5. The claimant has no past relevant work.
- 23 6. The claimant was born on XXXXX, 1966 and was 43 years old, which
 24 is defined as a younger individual age 18-49, on the date the
 application was filed.²
7. The claimant has a limited education and is able to communicate in
 English.
8. Transferability of job skills is not an issue because the claimant does
 not have past relevant work.

² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

9. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.

10. The claimant has not been under a disability, as defined in the Social Security Act, since June 4, 2009, the date the application was filed.

AR at 13-20.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Whether the ALJ gave sufficient reasons to discredit Plaintiff.
2. Whether the ALJ erred in assessing the opinions of Beth Sandman, M.D.; David Widlan, Ph.D.; and Jacquelin Higgins, MS, LHMC, MHP.
3. Whether the RFC and hypothetical questions were complete.

Dkt. 17 at 1-2.

VII. DISCUSSION

A. The ALJ Did Not Err in Discounting Plaintiff's Credibility.

The ALJ noted a number of reasons to discount Plaintiff's credibility: (1) limited improvement with her mental-health symptoms, despite non-compliance with medication; (2) some normal objective medical findings; and (3) self-reported daily activities inconsistent with allegations of total disability. AR at 17. As to the third reason, the ALJ pointed to Plaintiff's ability to prepare meals, take care of her personal hygiene, use public transportation and/or walk to get around town, shop for groceries twice a week, and babysit for a neighbor as demonstrating "a higher level of functioning than the claimant alleges." *Id.* (citing AR at 172-79, 472).

Plaintiff contends that the ALJ failed to provide clear and convincing reasons to discount her credibility. *See Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (holding that where there is no evidence of malingering, and ALJ must provide clear and

1 convincing reasons to reject a claimant's testimony). Plaintiff acknowledges that she "may
2 have uttered some contradictions, but nothing she said indicated [an] ability to sustain 8 hour
3 days, 40 hour weeks, week after week in sustained employment." Dkt. 17 at 14. She also
4 acknowledges that there is evidence of medication non-compliance, but emphasizes that her
5 treating providers were aware of non-compliance and still found her to be impaired. Dkt. 17 at
6 14-15.

7 Plaintiff has failed to establish that the ALJ erred in discounting her credibility, because
8 the ALJ drew reasonable inferences from the evidence, which undisputedly contains evidence
9 of inconsistent statements regarding capabilities and medication non-compliance. Although
10 Plaintiff interprets this evidence in a way that does not undermine her credibility, she has not
11 shown that the ALJ's interpretation was unreasonable. *See Morgan v. Comm'r of Social Sec.*
12 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible to more than
13 one rational interpretation, it is the ALJ's conclusion that must be upheld."). Specifically,
14 Plaintiff has not shown that the ALJ was unreasonable in finding that her self-reported daily
15 activities were inconsistent with her allegations that she "[b]asically [lives] like a hermit at
16 home" and that her anxiety constantly makes her mind race such that it is impossible to stay
17 focused on anything for very long. *See* AR at 43. Daily activities inconsistent with allegations
18 undermine the credibility of a claimant's testimony. *See, e.g., Turner v. Comm'r of Social Sec.*
19 *Admin.*, 613 F.3d 1217, 1224-25 (9th Cir. 2010) (finding that an ALJ did not improperly
20 discredit a claimant's subjective testimony that he could not "put up" with most people, where
21 the ALJ noted the claimant's ability to interact with providers and members of the public, and
22 date and get married).

23 Moreover, Plaintiff's concession that she has not always been compliant with her
24 treatment regimen for mental-health symptoms and diabetes undermines the credibility of her

description of severe symptoms, because those symptoms do not accurately reflect potential improvement with compliance — and impairments that can be controlled with medication cannot be considered disabling. *See Warre v. Comm’r of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). The ALJ noted that Plaintiff experienced limited improvement of symptoms despite her failure to entirely comply with her treatment regimen (see AR at 425, 455, 484), and this is a clear and convincing reason to discredit her testimony, especially because Plaintiff admits that she did not always comply with treatment and offers no compelling justification for so doing. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that an ALJ properly considers an unexplained or inadequately explained failure to follow a prescribed course of treatment). Because the ALJ provided clear and convincing reasons to discount Plaintiff’s credibility, the ALJ did not err.

B. The ALJ Erred in Assessing Some of the Medical Opinions.

The ALJ assigned great weight to the opinions of Plaintiff’s therapist, Ms. Higgins, and consultative examiner Dr. Widlan, and “some weight” to the opinions of Plaintiff’s treating psychiatrist Dr. Sandman. AR at 18-19. The Court will first address one issue that Plaintiff raises with respect to all providers, and then address the provider-specific arguments.

1. *Global Assessment of Functioning (“GAF”) Scores*

The ALJ did not mention the GAF scores indicated by these three providers in his decision. To the extent that Plaintiff assigns error to this failure, her assignment of error is rejected because GAF scores are not directly probative as to the ALJ’s disability inquiry, and thus need not be discussed by an ALJ, because the Commissioner has determined the GAF scale “does not have a direct correlation to the severity requirements in [the Social Security Administration’s] mental disorders listings.” 65 Fed. Reg. 50,746, 50,765-766 (Aug. 21, 2000).

2. *Dr. Sandman's Opinions*

Dr. Sandman signed medical source statements apparently prepared³ by therapist Annie Sharrett, B.A., in October 2011 (AR at 420-32): the ALJ assigned “some weight” one statement and “little weight” to the others, on the grounds that (1) the bipolar disorder diagnosis listed in the opinions was mentioned here for the first time, and thus cannot meet the durational requirement; (2) Plaintiff’s self-reported ability to use public transportation is inconsistent with Dr. Sandman’s opinion that Plaintiff has marked difficulty using public transportation; (3) Dr. Sandman stated that she had treated Plaintiff for years, but there are no treatment notes to support this; and (4) most of the limitations mentioned in one of Dr. Sandman’s opinion are accounted for in the RFC assessment. AR at 18-19.

Plaintiff contends that none of these reasons are legitimate. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (holding that an ALJ must provide specific and legitimate reasons to discount a controverted medical source opinion). As to the first reason — durational deficiencies as to bipolar disorder — Plaintiff points to Dr. Sandman’s June 2011 evaluation⁴ listing bipolar disorder as a “rule-out” diagnosis, and treatment notes in the months thereafter referring to symptoms of bipolar disorder. Dkt. 17 at 8-9 (citing AR at 455-58, 461). The Commissioner concedes that the ALJ misapprehended the support in the record for Dr. Sandman’s bipolar disorder diagnosis, but correctly notes that Plaintiff has not established that the ALJ overlooked any functional limitations associated specifically with bipolar disorder:

³ Plaintiff contends that the ALJ rejected this opinion as if it was written by a non-acceptable medical source (Dkt. 17 at 8), but the ALJ did no such thing. *See* AR at 18-19 (noting that Dr. Sandman signed a report prepared by Ms. Sharrett, but not discounting the opinion based on the status of its author).

⁴ Plaintiff also assigns error to the ALJ’s failure to discuss this evaluation (Dkt. 17 at 8-9), but fails to identify any significant or probative opinions regarding Plaintiff’s functioning that were contained in this report. AR at 459-61. Furthermore, the ALJ did discuss the evaluation in his discussion of the evidence. AR at 18-19.

1 Plaintiff herself argues that the limitations identified by Dr. Sandman could be attributed to
2 depression and PTSD, even if bipolar disorder had remained a rule-out diagnosis. Dkt. 17 at 9.
3 Based on that concession, the ALJ's error in dismissing the bipolar disorder diagnosis is
4 harmless.

5 As to the ALJ's second reason — inconsistencies between Dr. Sandman's opinion and
6 Plaintiff's self-reported activities — Plaintiff appears to argue that even if she contradicted
7 herself elsewhere in the record regarding her ability to use public transportation, Dr. Sandman
8 was entitled to rely on her own observations and not on Plaintiff's self-report. Dkt. 17 at 10.
9 But Plaintiff does not acknowledge that Dr. Sandman's opinion regarding her ability to use
10 public transportation was not supported by independent observation; clinic treatment notes in
11 fact indicate that Plaintiff was able to use public transportation. *See, e.g.*, AR at 469, 481-82.
12 It is unclear how Dr. Sandman's opinion regarding Plaintiff's ability to use public
13 transportation could have been formed via independent observation. Plaintiff has not shown
14 that the ALJ erred in finding that inconsistencies between Dr. Sandman's opinion and
15 Plaintiff's self-reported activities supported discounting Dr. Sandman's opinion. *See Rollins v.*
16 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (affirming an ALJ's rejection of a treating
17 physician's opinion that was inconsistent with the claimant's level of activity).

18 The ALJ's third reason — the duration of the treating relationship — is not entirely
19 clear as to whether the ALJ is referring to the length of time Plaintiff was treated by Ms.
20 Sharrett or by Dr. Sandman. AR at 18. The record shows that Plaintiff began therapy with Ms.
21 Sharrett in March 2011, after transferring care from her previous therapist (see AR at 466).
22 Plaintiff testified at the December 2011 administrative hearing that she had been seeing Dr.
23 Sandman for "going on a good year, it's been quite awhile now." AR at 46. Furthermore, the
24 record contains treatment notes from Dr. Sandman's clinic dating back to November 2009 (AR

1 at 240-52), which is consistent with the dates indicated on Dr. Sandman's opinion. AR at 425.
2 Thus, this reason is not a legitimate basis to discount Dr. Sandman's opinion.

3 As to the ALJ's final reason to assign "little weight" to Dr. Sandman's October 2011
4 opinion (AR at 425-32) — because most of the limitations she identified are accounted for in
5 the RFC, which limited Plaintiff to simple, repetitive tasks, with only occasional interaction
6 with co-workers and the public (AR at 15) — is not directly addressed by Plaintiff. She
7 argues that Dr. Sandman's opinions indicate that her mental impairments were severe, but the
8 ALJ acknowledged the existence of mental impairments. Dkt. 17 at 10-11. She also argues
9 that the opinions of other providers were either consistent or inconsistent with Dr. Sandman's
10 opinions, but also acknowledges that the ALJ did not rely on other inconsistent medical
11 opinions as a basis for discounting Dr. Sandman's opinions; thus, the relevance of other
12 medical opinions to an assessment of the ALJ's rejection of Dr. Sandman's opinions is not
13 clear. Dkt. 21 at 7-9. Because Plaintiff has not addressed whether the ALJ's RFC assessment
14 is inconsistent with Dr. Sandman's functional opinions, she has not shown that the ALJ's
15 analysis was erroneous. Accordingly, because Plaintiff has failed to establish that none of the
16 ALJ's reasons to discount Dr. Sandman's opinions is legitimate, his analysis should be
17 affirmed.

18 2. *Dr. Widlan's Opinion*

19 The ALJ assigned "great weight" to the opinion of consultative examiner Dr. Widlan.
20 AR at 18. Plaintiff argues that the ALJ actually rejected portions of Dr. Widlan's opinion —
21 specifically his opinion regarding Plaintiff's significant deficit in adaptation — without
22 providing specific and legitimate reasons to do so, and thus did not fully account for Dr.
23 Widlan's opinion in the RFC assessment. Dkt. 21 at 2.

1 Plaintiff's argument has merit. Dr. Widlan indicated that while Plaintiff has some
2 concentration deficits, she is nonetheless able to complete simple, repetitive tasks. AR at 352.
3 He noted that she was "cognitively able to accept instruction from a supervisor." *Id.* Dr.
4 Widlan also noted significant adaptation deficits, as exemplified by her failure to sustain
5 employment for ten years and her restricted range of activities. *Id.*

6 The Commissioner argues that because the ALJ restricted Plaintiff to simple, repetitive
7 tasks, consistent with Dr. Widlan's opinion, Plaintiff has failed to show any error in the ALJ's
8 assessment of Dr. Widlan's opinion. Dkt. 20 at 6. The Commissioner mentions Dr. Widlan's
9 opinion regarding Plaintiff's adaptation deficit, but fails to expressly indicate how the ALJ's
10 assessment accounted for that particular deficit. Because Dr. Widlan opined that Plaintiff had
11 a significant deficit in adaptation, and the ALJ acknowledged the same and purported to assign
12 great weight to it, but failed to explicitly account for that deficit or provide any reason to
13 discount Dr. Widlan's opinion on that issue, the ALJ erred. On remand, the ALJ shall reassess
14 Dr. Widlan's opinion, either accounting for Dr. Widlan's opinion regarding Plaintiff's deficit
15 in adaptation, or providing specific and legitimate reasons to discount his opinion.

16 3. *Ms. Higgins*

17 The ALJ assigned "great weight" to Ms. Higgins's opinions, to the extent that her
18 opinions were consistent with his RFC assessment. AR at 18. He provided no reasons to
19 discount any particular aspect of Ms. Higgins's opinion, and the Commissioner argues that this
20 is appropriate because the ALJ's RFC assessment is consistent with Ms. Higgins's opinion.
21 Dkt. 20 at 13-14. But the Commissioner fails to explain how the ALJ's RFC assessment
22 accounts for Ms. Higgins's opinion that Plaintiff has a marked impairment in her ability to
23 respond appropriately to and tolerate the pressures and expectations of a normal work setting.
24 Germane reasons may exist to discount that opinion, but the ALJ did not provide any, and

1 thereby erred. *See Smolen*, 80 F.3d at 1288-89 (holding that the ALJ can reject the testimony
2 of lay witnesses only upon giving germane reasons). Accordingly, on remand the ALJ shall
3 reassess Ms. Higgins's opinion, either accounting for the functional limitations contained in
4 her opinion in the RFC assessment, or providing germane reasons to discount her opinion.


5 C. The ALJ Shall Reassess Plaintiff's RFC.

6 For the reasons explained in the previous section, the ALJ's RFC assessment and
7 hypothetical were erroneous to the extent that they did not account for Plaintiff's adaptation
8 deficit or her limitation in the ability to respond appropriately to and tolerate the pressures and
9 expectations of a normal work setting, given that the ALJ provided no reasons to discount
10 medical opinions as to those limitations. On remand, the ALJ shall reassess Plaintiff's RFC in
11 light of Dr. Widlan's and Ms. Higgins's opinions, and obtain additional vocational expert
12 testimony if necessary.

13 VIII. CONCLUSION

14 For the foregoing reasons, the Court recommends that this case be REVERSED and
15 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
16 instructions. A proposed order accompanies this Report and Recommendation.

17 DATED this 27th day of September, 2013.

18 
19 JAMES P. DONOHUE
20 United States Magistrate Judge
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